No. 80-735

In the Supreme Court of the United States

OCTOBER TERM, 1980

BELLINGHAM FROZEN FOODS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant Attorney General

LAWRENCE J. SONG
Attorney
National Labor Relations Board
Washington, D.C. 20570

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QUESTION PRESENTED

Whether the Board properly found that a successor employer was obligated to recognize the union when, prior to the takeover, the successor employer made it "perfectly clear" that it planned to retain all of its predecessor's employees in the bargaining unit.

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The opinion of the court of appeals (Pet. App. A-1 to A-30) is reported at 626 F. 2d 674. The decision and order of the National Labor Relations Board (Pet. App. A-33 to A-213) are reported at 237 N.L.R.B. 1450.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1980 (Pet. App. A-30). A petition for rehearing was denied on September 26, 1980 (Pet. App. A-31 to A-32). The petition for a writ of certiorari was filed on November 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at pages 2-3 of the petition.

STATEMENT

1. Bellingham Cold Storage (a different corporation from petitioner) has leased a frozen food packing plant to a succession of food processing firms (Pet. App. A-2, A-60 to A-61). The workforce at the plant consists of nonseasonal employees and a number of seasonal employees depending on the vegetable processing season (Pet. App. A-3 to A-4, A-64 to A-65). Under each of the lessees, the plant traditionally has maintained a seniority list of seasonal employees, and has recalled the seasonal employees in the order of their seniority when it needs additional processing employees (Pet. App. A-4 to A-5, A-67 to A-70). For many years, the General Teamsters, Warehouse, Food Processing & Cannery Workers & Public Employees Local 231 ("the Union") represented the lessees' production and maintenance employees—both seasonal and nonseasonal (Pet. App. A-5 to A-6, A-65 to A-67).

In February 1977,[1] San Juan Packers, Inc., the third lessee of the plant, filed a petition in bankruptcy (Pet. App. A-2, A-61). On March 16, petitioner's president, Gordon Hayes, met with a representative of the Union, Marvin Eggert, and informed him that petitioner was in the process of purchasing San Juan's operations. When Eggert confirmed that the Union represented the production and maintenance employees, Hayes stated that there were some employees on the seasonal seniority list that petitioner might not want to hire because of their inadequate performance (Pet. App. A-92 to A-93).

Petitioner purchased San Juan's assets and leasehold on April 1, and began its own operations on April 4 (Pet. App. A-61 to A-62). Petitioner continued to operate the plant in the same manner as had San Juan (Pet. App. A-62).[2] It retained all of the unit employees then working for San Juan (except for the repack employees (see note 2, *supra*)), and President Hayes informed them on the morning that petitioner began operations that they would continue to be paid the same wage rates they had received from San Juan (Pet. A-96 to A-97, A-133).

Petitioner maintained virtually all previous working conditions for a week after the takeover. On April 10, however, it instituted unilateral changes in wage rates and break times (Pet. App. A-98 to A-99). During a meeting between Hayes and Eggert on April 14, Hayes stated that

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[1]All events referred to herein occurred in 1977.

[2]After the sale, the Bankruptcy Court permitted San Juan to operate the "repack" portion of the operation until it fulfilled certain outstanding obligations. Petitioner acquired the repack operation in July (Pet. App. A-61 to A-62, A-137).

seasonal employees should not be included in the bargaining unit (Pet. App. A-7, A-99 to A-100). On April 22, Hayes sent a letter to Eggert in which he denied any obligation to bargain with the Union (Pet. App. A-7, A-102 to A-103). However, negotiations continued and, on May 13, petitioner presented the Union with a proposed contract excluding seasonal employees from the bargaining unit. On May 16, the employees went out on strike (Pet. App. A-7 to A-8, A-103 to A-105).

In June, petitioner began hiring seasonal employees. While the past practice had been to call seasonal employees on the seniority list in order of seniority, petitioner merely invited all previous employees to apply for jobs. Petitioner also accepted applications from anyone else who wished to apply for processing work (Pet. App. A-8 to A-9, A-111, A-136). By August 6, petitioner had hired 84 employees who previously had worked for San Juan and 79 new employees. It was not until the payroll period ending August 20 that the new employees outnumbered those employees who had worked for San Juan (Pet. App. A-139 to A-140).

2. The Administrative Law Judge, whose decision was adopted by the Board (Pet. App. A-34 to A-35), found that petitioner was a successor to San Juan in the production and maintenance unit. The ALJ rejected petitioner's contention that it never intended to hire San Juan's complement of seasonal employees and that therefore its status as a successor employer should be determined only as of the time it had hired its full complement of seasonal employees—at which point its predecessor's employees constituted less than a majority of its workforce. Rather, the ALJ found that, when petitioner commenced operations, it intended to resort to the existing seasonal seniority list to staff its

seasonal complement (except for a few individuals who were considered unsuitable) and that it initially recognized the Union as the representative of both the permanent and seasonal employees (Pet. App. A-147 to A-153, A-158 to A-167). It was only after the Union refused petitioner's demands to exclude the seasonal employees from contractual coverage and to abandon its insistence on certain benefits for them that petitioner "abruptly change[d] direction and challenge[d] the Union's status as bargaining representative for the seasonal employees" (Pet. App. A-153). The ALJ explained (Pet. App. A-153 to A-154) that

> [t]he fact that [petitioner] may have had second thoughts in light of the Union's position on the terms of a collective bargaining agreement hardly provides justification for a change in the status of these employees. To the contrary, having accepted the obligation to adhere to past hiring practice, [petitioner] had accepted the obligation to hire these employees, save for "some" of them, once the processing season began. Accordingly, as had been their status with * * * San Juan, the employees on the 1976 seniority list became employees of [petitioner] within the meaning of Section 2(3) of the Act, on layoff status with an expectancy of recall once the processing season commenced.

Accordingly, the Board concluded that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to continue recognizing the Union as the representative of all the seasonal employees in the production and maintenance unit, by insisting on excluding seasonal employees from the contract covering the unit, and by making unilateral changes in unit working conditions. The Board further found that petitioner had violated Section 8(a)(3) and (1) of the Act by refusing the unconditional requests of 10 unfair labor practice strikers to return to their jobs and by telling employees that it would not agree to a contract unless the employees accepted an agreement which excluded seasonal employees from the unit (Pet. App. A-10 to A-11). The Board ordered petitioner, *inter alia*, to bargain with the Union as the exclusive bargaining representative of all the employees in the production and maintenance unit as historically composed, to reinstate any terms of employment that existed on April 1, and to make the employees whole for losses caused by the unilateral changes in working conditions (Pet. App. A-194 to A-195).[3]

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[3]The Board also found that San Juan had violated Section 8(a)(3) and (1) of the Act by discharging a clerical employee because of her union activities, and Section 8(a)(1) by committing other acts that interfered with the clerical employees' statutory right to select the Union as their bargaining representative (Pet. App. A-9 to A-10). The Board ordered petitioner to remedy these unfair labor practices of San Juan (Pet. App. A-192 to A-193).

3. The court of appeals upheld the Board's findings of violations of the Act by petitioner and enforced its order remedying those violations.[4] It found that substantial evidence supported the Board's finding that petitioner intended "to hire a majority of its employees from those who previously worked for San Juan in the production and maintenance unit * * *" (Pet. App. A-17 to A-18). The court stated (Pet. App. A-21 to A-23) that

> [n]ot only was the initial production and maintenance unit composed entirely of former San Juan employees, but San Juan employees also continued to constitute a majority of the unit for a substantial period of time after the takeover. Former San Juan workers were not outnumbered in the unit until the payroll period ending August 20, almost five months after [petitioner] began to operate the plant * * *.
>
> [Petitioner] only challenged the Union's representative status once it became clear from its contract negotiations that the Union would not agree to change the bargaining unit to exclude seasonal employees. By this time [petitioner's] obligation to bargain with the Union had already occurred. That obligation occurred as soon as it was perfectly clear that [petitioner] intended to accept San Juan employees as its own in the production and maintenance unit. In fact, the Board found that [petitioner], in acknowledgment of its obligation to bargain, recognized the Union voluntarily—a finding supported by substantial evidence. [Petitioner's] subsequent actions may not dissolve that obligation to bargain.

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[4]The court denied enforcement of that portion of the Board's order which required petitioner to remedy the unfair labor practices committed by San Juan (note 3, *supra*) (Pet. App. A-26 to A-30). No issue concerning that aspect of the court's order is raised here.

ARGUMENT

1. In *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 294-295 (1972), this Court held that:

> [a]lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

Petitioner challenges (Pet. 10-11) the Board's conclusion, which was upheld by the court of appeals, that it was "perfectly clear" when petitioner commenced operations that it intended to retain both the seasonal and non-seasonal employees. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

In any event, as shown at pages 2-3, *supra*, the Board's findings are amply supported by the record. Prior to the takeover, petitioner's president had told the Union that he would employ all of San Juan's production and maintenance employees except those who were considered to be poor workers; employees were asked to remain in their current positions without having to apply to petitioner for employment; on the morning of the takeover, the employees were assured that they would continue to be paid at the same rates; and pre-takeover working conditions were maintained for a week after the takeover. Petitioner's initial production and maintenance unit was composed entirely of former San Juan employees, and former San Juan employees continued to constitute a majority of the unit for almost five

months after the takeover. Thereafter, almost every seasonal employee on the seniority list who applied for employment was hired.[5]

2. Petitioner contends (Pet. 12-20) that *Burns* requires not only an intention to hire the predecessor's employee complement but an effectuation of that intention; therefore, no bargaining obligation may be imposed on it because, even if it had intended to hire its predecessor's employee complement when it commenced operations, in fact, the predecessor's employees comprised less than a majority of petitioner's ultimate workforce. This contention is without merit.

When petitioner took over San Juan's operation, and for almost five months thereafter, a majority of petitioner's workforce consisted of employees who had worked for San Juan. It was only after petitioner changed its pre-takeover intent and abandoned the decade-long practice of calling seasonal employees from the seniority list in order of seniority that the complement of non-San Juan employees eventually outnumbered the San Juan employees in the unit. But the ALJ, whose findings were upheld by the Board and the court of appeals, found that petitioner abandoned that past practice with respect to recalling seasonal employees not out of "business need," but because it decided, after it had agreed to hire those employees and recognize the Union

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[5]That only 108 of the 208 employees on the seniority list applied for work with petitioner (Pet. 15) was, as the ALJ found (Pet. App. A-111 to A-112), attributable to petitioner's failure to notify the seasonals, as had been the customary practice.

on their behalf, that it did not want to apply the contract to them (Pet. App. A-152 to A-154, A-34 to A-35, A-21 to A-22). Nothing in *Burns* permits petitioner to avoid a bargaining obligation to the Union in these circumstances.[6]

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[6] *Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO* v. *NLRB*, 595 F. 2d 664 (D.C. Cir. 1978), cert. denied, 439 U.S. 1070 (1979), affirming *Boeing Co.*, 214 N.L.R.B. 541 (1972), and *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), enforced, 529 F. 2d 516 (4th Cir. 1975) (mem.), relied on by petitioner (Pet. 13), are distinguishable from the situation here. In *Boeing, supra*, 214 N.L.R.B. at 541, the Board, upheld by the court of appeals, found that it was not "perfectly clear" that the successor would hire the predecessor's complement of employees because the successor's offer of employment was conditioned on changed working conditions which it was not certain would be accepted by a majority of its predecessor's employees. Similarly, in *Spruce Up, supra*, 209 N.L.R.B. at 195, the Board held that the new employer had no obligation to bargain with the union at the time of the takeover because it was not clear that the predecessor's employees would accept employment under the conditions the employer offered. However, at the point that the employer actually hired a majority of the predecessor's employees, the employer was obligated to bargain with the union because "from that date, the Union had, at the least, a presumption of continuing majority status which [the employer] failed to overcome." *Id.* at 196.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLAIM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAWRENCE J. SONG
Attorney
National Labor Relations Board

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